STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-135

December 17, 2004

VERIZON MAINE
Petition for Consolidated Arbitration

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we grant Verizon Maine's (Verizon) Motion to Dismiss, we stay this proceeding as to the five remaining carriers, and we reiterate our commitment to completing all litigation associated with the Wholesale Tariff Proceeding, Docket No. 2002-682. We also decline the requests of several competitive local exchange carriers (CLECs) to impose sanctions on Verizon for its conduct in this proceeding.

II. BACKGROUND

On February 20, 2004, Verizon filed a Petition for Consolidated Arbitration (Petition for Arbitration or Petition). The Petition requested that we arbitrate, pursuant to Section 252 of the Telecommunications Act of 1996 (TelAct), disputes between Verizon and competitive local exchange carriers (CLECs) and Commercial Mobile Radio Service (CMRS) carriers relating to Verizon's October 2, 2003 Proposed Amendment to all interconnection agreements. Multiple CLEC parties filed Motions to Dismiss Verizon's Petition; Verizon objected to each Motion, claiming that even though there may have been procedural infirmities in its Petition and the issues overlapped with our Wholesale Tariff proceeding, dismissal was too drastic and that resolution of the contract issues associated with the interconnection agreements was essential. Verizon referred us to its October 3, 2003 Notice to CLECs which specifically stated that CLECs *must* sign Verizon's proposed amendment in order to have the "changes in law effected by the Triennial Review Order"[1] implemented. (Verizon's Opposition to Motions to Dismiss p. 4.) Verizon insisted that the Arbitration proceeding had been initiated to "arbitrate *new* interconnection agreement terms – not to interpret the terms of *existing* agreements." (Verizon Maine's Response to the Hearing Examiner's Procedural Order at p. 3.) Finally, in response to a Hearing Examiner's Report recommending that the Arbitration proceeding be dismissed, Verizon claimed that, "[c]ontrary to the Hearing Examiner's apparent belief, both the public interest and fundamental fairness demand that this proceeding continue." Indeed, Verizon went further and declared that "resolving disputes about the appropriate language to reflect the FCC's new rules is the *most important* task facing the Commission as it seeks to promote local competition in

[1]Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al*., FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO).*

Maine." (Verizon's Exceptions to the Hearing Examiner's Report at p. 1, 3.) (emphasis in the original)

Thus, despite so-called "self-executing" language in the interconnection agreements,[2] Verizon contended that Commission arbitration was necessary to relieve Verizon of obligations in its existing agreements and incorporate the more limited requirements of the *TRO*. (*Id.* at p. 4-5.) Verizon also insisted that arbitration under section 252 of the TelAct was the only appropriate vehicle for resolving Verizon's concerns. (*Id.* at 6.)

On June 11, 2004, after we spent considerable time reviewing the various petitions and arguments, we issued an order denying the CLECs' Motions to Dismiss and consolidating the Arbitration proceeding with the Wholesale Tariff case. We directed the parties to develop a joint matrix outlining the issues that needed to be resolved in the Consolidated Proceeding. The parties failed to follow our direction, necessitating several procedural orders and teleconferences to further direct the parties to comply with the June 11th Order. On September 13, 2004, the parties finally submitted the Joint Matrix.

III. VERIZON'S MOTION AND THE CLECS' OPPOSITION

A. Verizon's Motion

On September 20, 2004, Verizon filed a "Notice of Dismissal" purporting to dismiss the vast majority of the CLEC parties to this proceeding.[3] In a reversal of its earlier positions, Verizon now claims that language already existing in all but five of its interconnection agreements would allow Verizon to unilaterally implement the changes of law occasioned by the *TRO* and *USTA II* and that amendment was not, in fact, necessary. Verizon urged us to wait until "actual disagreement" materializes concerning interpretation of the interconnection agreements, although at the same time Verizon acknowledged that the interconnection agreements did not contain any provisions governing how such disputes should be addressed.

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[2]Verizon now claims that certain language in the interconnection agreements concerning notification to CLECs allows it to alter its provision of UNEs to a CLEC without amending the interconnection agreement.

[3]While Verizon captioned its submission as a "Notice," the Hearing Examiner issued a Procedural Order on September 21, 2004, stating that Verizon's filing would be considered a Motion to Dismiss. Accordingly, we will refer to Verizon's filing as the "Motion" or "Motion to Dismiss."

B. CLECs' Position

Biddeford Internet Corporation d/b/a Great Works Internet (GWI), the Competitive Carrier Coalition (CTC Communications Corp. and Lightship Telecom, LLC), the Competitive Carrier Group (A.R.C. Networks, Inc. d/b/a InfoHighway Communications Corporation, KMC Telecom V, Inc., XO Communications, Inc. and XO Maine, Inc.), the CLEC Coalition (Mid-Maine Communications, Oxford Networks, Revolution Networks, and Pine Tree Networks), Conversent Communications (Conversent), Skowhegan Online, Inc. (SOI), and United Systems Access Telecom, Inc. d/b/a USA Telephone (USA) all filed comments on Verizon's Motion.

The Competitive Carrier Coalition did not object to Verizon's Motion to Dismiss but disagreed with assertions made by Verizon in its Motion. The Competitive Carrier Coalition asserted that Verizon may not unilaterally terminate a UNE, by notice or otherwise, where Verizon and the CLEC disagree as to whether an unbundling obligation continues. The Competitive Carrier Coalition endorsed Commission action similar to that taken by the Vermont Service Board in its August 25, 2004 Order on a similar motion made by Verizon in Vermont. *See Petition of Verizon New England Inc., d/b/a Verizon Vermont, for arbitration of an amendment of an interconnection agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio service providers in Vermont,* Docket No. 6932, Order Re: Verizon Motion of Withdrawal, (Aug. 25, 2004). Specifically, the Competitive Carrier Coalition urged us to take no position on the merits of Verizon's interpretation of the interconnection agreements, address any CLEC petitions that might arise if Verizon acts unilaterally to amend the agreements, continue arbitration of issues raised by other parties to the proceeding, and allow the "dismissed" parties to continue to participate in the proceeding because the decisions reached would likely impact these parties.

The CLEC Coalition also did not object to Verizon's Motion to Dismiss but requested that we condition any such dismissal on Verizon first compensating all dismissed CLECs for the actual costs incurred as a result of Verizon's "frivolous mass joinder" of CLECs to the proceeding. The CLEC Coalition referred us to an arbitration decision from Rhode Island on a similar motion by Verizon, *In re: Petition of Verizon-Rhode Island for Arbitration of An Amendment to Interconnection Agreements With Competitive Local exchange Carriers and Commercial Mobile Radio Service Providers In Rhode Island To Implement The Triennial Review Order*, Docket No. 3588, Second Procedural Arbitration Decision, (Aug. 18, 2004). The Rhode Island arbitrator found that while the circumstances of Verizon's withdrawal warranted the imposition of fees and costs, Rhode Island law did not authorize the arbitrator to make such an award. The CLEC Coalition argued that section 745(b) of Chapter 110 allows us to condition any dismissal of an action on terms and conditions we find proper and that we should exercise that authority to impose costs on Verizon. Finally, the CLEC Coalition noted that it would object to any attempts by Verizon to unilaterally amend its interconnection agreements.

The Competitive Carrier Group opposed Verizon's attempt to dismiss the action, noting that Verizon could not unilaterally determine each party's rights under the interconnection agreement. The Competitive Carrier Group argued that only we could determine the impact that the *TRO* and *USTA II* had on the interconnection agreements. Further, the Competitive Carrier Group argued that Verizon's Motion did not contain any reference to specific interconnection agreement language which would allow it to implement changes of law without a written amendment. Finally, the Competitive Carrier Group argued that Verizon waived any argument it might have that the interconnection agreements did not have to be amended, when Verizon allowed the matter to remain pending for over six months.

Conversent did not oppose Verizon's dismissal of a large number of parties but argued strongly that we should impose conditions on the dismissal. Specifically, Conversent asked that we expressly state that we are not ruling on the merits of Verizon's interpretation of existing interconnection agreements, that our June 12, 2004, and August 19, 2004 Orders concerning routine network modifications remain in effect notwithstanding Verizon's withdrawal, and that the withdrawal not affect the ability of Conversent and other parties to litigate their concerns in the Wholesale Tariff and Dark Fiber proceedings. Finally, Conversent requested that we impose costs on Verizon, in the form of civil damages under 35-A M.R.S.A. § 1501, because Verizon's filing caused other parties and the Commission to expend seven months' worth of time, effort, and money litigating Verizon's Arbitration Petition.

GWI disagreed with Verizon's assertions regarding its obligations to provide access to network elements and the status of the interconnection agreement but believed that Verizon should be free to withdraw its request for arbitration. SOI also believed that Verizon should be free to withdraw its request, since SOI did not seek the arbitration. SOI asserted, however, that its agreement to the dismissal did not indicate acceptance of Verizon positions regarding the state of SOI's interconnection agreement with Verizon or Verizon's responsibility to provide any unbundled network elements. SOI also noted that it was "still essential that this combined docket continue and that the many pending issues be resolved." Finally, USA did not oppose Verizon's Motion but requested that we confirm that Verizon does not have the right to unilaterally stop providing network elements.

C. <u>Verizon's Reply Comments</u>

Verizon filed reply comments regarding some of the issues raised by the CLECs. Verizon urged us to "move forward expeditiously" to arbitrate the agreements of the five CLECs that Verizon contends must amend their interconnection agreements. Verizon spent the remainder of its comments making legal arguments concerning its belief that amendment to its interconnection agreements is not necessary in order to implement the changes in federal law and its continued belief that the only "applicable law" concerning interpretation of its interconnection agreements is federal law. Verizon's only response to the CLECs' call for the imposition of sanctions came in a footnote and included Verizon's statement that "it should be readily apparent" that it did not initiate the proceeding frivolously.

III. DECISION

A. Dismissal of Arbitration Proceeding

We are once again faced with a complex situation made even more so by the ever-changing federal regulatory landscape. The complexity of the situation before the Commission in this docket and the Wholesale Tariff proceeding (Docket No. 2002-682) requires good faith efforts by all parties to move forward on issues as expeditiously as possible. Sorting through the difficult legal issues and factual questions raised by the changes of law made at the federal level and in the Commission's recent decisions in the Skowhegan Online proceeding (Docket. No. 2002-704) and the Wholesale Tariff proceeding will necessitate a significant effort by all parties. It demands that each party take responsibility for ascertaining its legal rights and obligations under the law and its interconnection agreements and take all necessary steps to enforce its rights in an orderly fashion. It appears to us that this has not occurred to the fullest extent possible because of a number of factors, including: (1) continually changing federal law; (2) a "take or leave it" approach to negotiation; (3) unrealistic expectations that the Commission will step in and "fix" the situation; (4) dogmatic argument on legal issues; and (5) the expenses associated with fully litigating matters before the Commission and the FCC.

Rather than attempt to resolve at this time all of the jurisdictional questions raised by the filings, we will focus on setting a course that will, in our view, provide a practical way to address the merits of the interconnection issues. We recognized back in April 2002 the need for a wholesale tariff which sets forth standard terms and conditions. Thus, we conditioned our support of Verizon's federal 271 application upon Verizon's explicit agreement to file such a tariff in Maine. (At that time, Verizon had filed wholesale tariffs in a number of other states which set forth both the prices and terms and conditions associated with its wholesale offerings but Maine had only Commission-approved TELRIC rates.) Verizon knowingly and willingly agreed to file a wholesale tariff in exchange for our support at the FCC, which we gave in the form of a Report to the FCC dated April 10, 2002, finding that Verizon had met the 271 checklist in Maine. Verizon began fulfilling its commitment when it filed a proposed Wholesale Tariff in November of 2002. We expect Verizon will continue to honor its commitment despite recent cases from other jurisdictions which seem to suggest certain limitations on a state commission's authority to require the filing of a wholesale tariff.[4] Indeed, absent a

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[4]We have reviewed the Sixth Circuit's decision in *North v. Strand*, 309 F.3d 935 (2002), and the Seventh Circuit's decision in *Bie v. Worldcom*, 340 F.3d 441 (2003), and do not find them dispositive of the issues before us. First, neither decision is binding in the First Circuit. Second, both cases involved situations where the ILEC opposed filing a wholesale tariff. Here, Verizon had already explicitly agreed to file such a tariff in Maine in order to secure Commission support for its 271 application. We do not need to

direct finding by a court with jurisdiction over us, we see no reason to absolve Verizon of its 271 commitment to file a wholesale tariff.

We find that granting Verizon's Motion to Dismiss as to all but five parties will allow us to proceed expeditiously with our litigation of the Wholesale Tariff, a proceeding we view as a more efficient vehicle for resolving many of the complex legal and policy issues facing Verizon and the CLECs. We believe that focusing the parties' resources and attention on that proceeding, rather than trying to resolve both proceedings in parallel, will benefit all parties involved, including the Commission. Indeed, while we recognize our responsibility to address issues as they are brought to us, we also must consider our obligation to the ratepayers to conduct our affairs as efficiently as possible.

In order to focus our attention on the Wholesale Tariff, we will stay this proceeding as to the five remaining parties until we complete our litigation of the Wholesale Tariff. We recognize that section 252 of the TelAct sets specific time limits for state arbitration proceedings. To the extent that Verizon or the other parties do not expressly waive those limits within thirty (30) days of this Order, we will also dismiss without prejudice this proceeding as to those five parties. Pursuant to section 252, parties would then be free to take their arbitration to the Federal Communications Commission (FCC).

The first areas to be litigated in the Wholesale Tariff proceeding will be the terms and conditions associated with loops and the general terms and conditions applicable to all UNEs. In order to get the proceeding moving again, we require Verizon to file testimony supporting its loop UNE terms and conditions and any decision by Verizon not to include loop UNEs provided by Verizon as of April 2002. To the extent that Verizon's proposed tariff does not include terms and conditions for specific types of loops that CLECs believe Verizon must provide under state or federal law, CLECs should raise those issues in their prefiled testimony and propose specific terms and conditions. Pricing matters will be left to a later date and the specific schedule will be set by procedural order.

As a final matter, we note that the decision we make today has no impact on earlier decisions made in this and related dockets. Commission orders remain in effect until we, by a new order, rescind, modify, or otherwise change them. Further, we do not reach any conclusions regarding the specific arguments raised by the parties concerning how Verizon's interconnection agreements should be interpreted.

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decide today the exact relationship between our Wholesale Tariff and individual interconnection agreements. We expect, however, that litigating many of the overarching legal and policy issues in the Wholesale Tariff proceeding will simplify the individual interconnection agreement negotiation process.

B. Sanctions

Chapter 110, § 1 of the Commission's Rules provides that: "Procedures not specifically addressed by these rules shall be governed by the Maine Rules of Civil Procedure and the procedural requirements of 5 M.R.S.A. § 8001, *et. seq.* and Title 35-A of the Maine Revised Statutes." Chapter 110 of the Commission's Rules does not address issues relating to sanctions against parties and/or their attorneys for frivolous or misleading filings. Rule 11 of the Maine Rules of Civil Procedure provides that an attorney's signature on a pleading or motion represents a belief that, to the best of the signor's knowledge, information and belief, there is good ground to support the motion or pleading and that it is not interposed for the purpose of delay. If a pleading or motion is signed with intent to defeat the rule, i.e. without good cause or for the purpose of delay, a court may impose upon the person who signed it and the represented party an "appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading or motion, including a reasonable attorney's fee."

While Verizon may be technically correct that it did not change its underlying legal position, it certainly changed its strategy, in that it initially pushed for arbitration against all CLECs and now wants us to dismiss its petition except as to five of them. There is no question that because of Verizon's actions in this proceeding, both the Commission and the CLECs have expended considerable energy only to find that we are back where we started. If Verizon had taken its current approach from the beginning, or heeded the points made by CLECs in their Motions to Dismiss last April, all parties could have avoided unnecessary resource expenditures.

Notwithstanding Verizon's conduct, we do not find that the facts before us support imposing sanctions on Verizon for violations of Rule 11 of the Maine Rules of Civil Procedure or otherwise. In addition, litigation over sanctions would be counterproductive for the parties and would deflect all of us from the more important work of the Wholesale Tariff. We instead instruct the Hearing Examiner to set an aggressive schedule in the Wholesale Tariff proceeding. To the extent that relevant information is not forthcoming from Verizon, or any other party, all reasonable inferences will be drawn against the dilatory party. Moreover, dilatory conduct or sharp practices by any party as the case unfolds will likely prompt us to reopen the question of whether a course of conduct exists warranting censure.

Dated at Augusta, Maine, this 17th day of December, 2004.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.